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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1964**

**No. 954**

ERWIN H. EZZES,

*Petitioner,*

—against—

SOL A. DANN, et al. and MARY L. GALLO, et al.,
*Respondents, Plaintiffs below,*

and

CHRYSLER CORPORATION, et al.
and PAUL C. ACKERMAN, et al.,
*Respondents, Defendants below,*

and

HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, et al.,
*Respondents, Objectors below,*

and

ARTHUR HOFFMAN,
*Petitioner (No. 893, Oct. Term 1964),*
*Objector below.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

*To the Justices of the Supreme Court of the United States:*

Erwin H. Ezzes, petitioner herein, respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Delaware entered

on Dec. 7, 1964, which affirmed a judgment of the Chancery Court of the State of Delaware, New Castle County, which was entered on March 9, 1964. The judgment of the Delaware Chancery Court approved, subject to certain conditions with which the defendants complied, the settlement of two stockholders derivative actions.

Petitioner Ezzes was one of several stockholders who objected to the settlement.

## The Within Petition for Certiorari Differs from the Petition Filed by Arthur Hoffman and Which is Pending Determination Before This Court

On or about February 10, 1965, Arthur Hoffman, another stockholder-objector, filed a petition with this court for a Writ of Certiorari (*Hoffman* v. *Chrysler Corporation*, et al., No. 893, October 1964 Term).

The basis upon which within petitioner Ezzes seeks certiorari, differs entirely from the basis upon which petitioner Hoffman in No. 893 seeks certiorari.

## Jurisdiction

The judgment of the Supreme Court of the State of Delaware was made and entered on December 7, 1964. A copy thereof is annexed to this petition in the Appendix at pp. 21-22.

The jurisdiction of this Court is invoked pursuant to 28 USC Sec. 1257 (3).

## Opinions Below

The opinion of the Chancery Court of the State of Delaware, is reported at 198 A.2d 185.

The opinion of the Supreme Court of the State of Delaware has been set forth in full in the Appendix to the Hoffman petition (pp. 9 to 30). For purposes of our argument, it is not necessary to refer to the entire decision of the Delaware Supreme Court. Hence we print in our Appendix hereto, on pp. 22 to 24, only that portion of the decision which relates to our argument.

## Question Presented

The question presented is of nationwide importance. It involves fair corporate suffrage, and the interrelation between Federal law and its enforcement in State courts. In particular, it involves whether state courts must enforce Sec. 14(a) of the Securities Exchange Act of 1934, which prohibits the solicitation of misleading proxy statements by corporate management, not in a situation where the violation is used by a litigant for the purpose of obtaining affirmative relief, but in a situation where the violation is interposed in a State court action for the purpose of denying relief to a litigant who has chosen the State court as his forum (See II Loss-Securities Regulations (1961), pp. 977-986). There is a dearth of authority on the subject. Delaware, however, appears to hold not only that it is not required to enforce Section 14(a) in a State Court matter, but that it is prevented from doing so by the "exclusive jurisdiction" phrase of

Sec. 27 of the Securities Act (See II Loss-Securities Regulations, 1961, pp. 977 to 980).

The problem goes to the heart of fair corporate suffrage. The question is:

> Does Section 14(a) prohibit a State Court from approving the adoption of a corporate Incentive Compensation Plan which is detrimental to the stockholders, where the Incentive Compensation Plan is part of a settlement of a stockholders derivative action, where valid stockholder approval is necessary before the Incentive Compensation Plan can be adopted, and where the proxies which solicited stockholder approval were false and misleading in violation of Sec. 14(a)?

## Statutes, Federal Rules and Regulations Involved

The pertinent portions of the Securities Exchange Act of 1934, 15 USC Sec. 78a et seq. (particularly Sec. 78n(a) and Sec. 78aa), and Rule 14a-9, 17 CFR 240.14a-9, are set forth in the Appendix at pp. 25-26.

## Statement

Chrysler Corporation is a Delaware corporation whose shares are publicly held and sold all over the United States on the New York Stock Exchange. It is engaged primarily in the business of manufacturing and selling automobiles.

On August 12, 1960, and February 23, 1962, two stockholders derivative actions were commenced by

stockholders of Chrysler, to recover many millions of dollars against officers and directors of Chrysler for alleged wrongs to Chrysler.

On March 6, 1963, the plaintiffs and defendants in the derivative actions, entered into a stipulation of settlement of the actions. The settlement did not require the defendant officers and directors, or anyone else, to pay any monies or property to Chrysler in exchange for Chrysler's release of its claims against them. Substantially, the entire settlement consisted of changing the terms of an incentive compensation plan which had been ratified by the Chrysler stockholders in 1956 ("1956 Plan"). The new incentive compensation plan was to take effect as of 1963 ("1963 Plan").

Both the 1956 Plan and the 1963 Plan, provided for the payment to Chrysler officers, directors and employees, of compensation in addition to their stipulated salaries, if the earnings of Chrysler in any given year exceeded a certain amount as fixed by formula. The basic difference between the 1963 Plan and the 1956 Plan, was this: if the earnings of Chrysler for any given year did not reach a certain amount, the 1956 Plan would require Chrysler to pay more incentive compensation than would the 1963 Plan. If however, the earnings of Chrysler for any given year exceeded a certain amount, the 1963 Plan would require Chrysler to pay more incentive compensation than would the 1956 Plan. The difference between the operation of the two plans was summed up by the Treasurer of Chrysler as follows: If 1963 net earnings were $31,000,000, there would be no bonus under either Plan. If net earnings were between $31,000,000 and $47,000,000 there would be no bonus

under the 1963 Plan, but there would be a bonus under the 1956 Plan. If net earnings were between $47,000,000 and $101,000,000, there would be a bonus under both plans, but the bonus under the 1956 Plan would be greater. If earnings were in excess of $101,000,000, the bonus under the 1963 Plan would be greater than under the 1956 Plan.

The Board of Directors of Chrysler approved the settlement and the 1963 Plan at meetings which were held on February 7, 1963, and March 21, 1963.

Seventeen of the nineteen members of the Board were present at the meeting of February 7, 1963. Of the seventeen directors who were present, all but two were interested either as recipients of incentive compensation, or defendants in the actions, or both. The action of the Board was illegal. It violated Art. II Sec. 6 of Chrysler's By-Laws, which required a majority vote of the disinterested directors in office to constitute a quorum, and in no case less than one third of the largest number of directors fixed by the By-Laws.

Sixteen of the nineteen members of the Board were present at the meeting of March 21, 1963. Of the sixteen directors who were present, all but four were interested either as recipients of incentive compensation, or defendants, or both. The action of the Board at this meeting was illegal as violative of the aforementioned Quorum By-Law.

Neither the directors who were defendants, nor the directors who were entitled to participate in the incentive compensation plan, left the Board room when the vote was taken at either of the meetings. All

directors who were present at the meetings voted upon the matter. Article II Section 9 of the Chrysler By-Laws, which provided that no director shall vote upon a matter in which he is interested, or be present when a vote is taken upon the matter, was violated at both meetings.

The 1956 Plan had originally been approved by the Chrysler stockholders. By its terms, it could not be changed without stockholder approval. Hence valid stockholder action and approval of the 1963 Plan was necessary before it could become effective.

Since the change from the 1956 Plan to the 1963 Plan was part of the proposed settlement of a stockholders derivative action, the 1963 Plan could not take effect unless the proposed settlement and the Plan were also approved by the Delaware Chancery Court.

Prior to submitting the proposed settlement to the Delaware Chancery Court for its approval, the Chrysler directors, on or about March 6, 1963, caused Chrysler to send a proxy dated March 4, 1963 to each of its stockholders, which solicited the votes of the stockholders for approval of the 1963 Plan and the proposed settlement, at a stockholders meeting which was to be held on April 16, 1963. This proxy was false and misleading, and violated Section 14a of the Securities Act. As found by both the Delaware Chancery Court and the Delaware Supreme Court, before the date of the stockholders meeting, the directors had information which "assured the directors that the 'new' plan (1963 Plan) would produce a substantially greater fund than would the old plan (1956 Plan) for 1963." The directors knew that there had

been general public acceptance of the 1963 Chrysler model. The model year begins on August 1st of each year and ends on the following July 31st. Within the first three months of the model year, the directors find out how well the model is accepted by the public.

The 1963 model was well accepted by the public. In the first five months of the 1963 model year, Chrysler's penetration had increased to 11.9 percent of the market. By April 1963, this had further increased to 12.5 percent. This was better than 1962, when the income of Chrysler before taxes was $126,000,000. The 1963 first quarter sales were substantially ahead.

The 1963 sales target was higher than for the model year 1962. These sales objectives had already been exceeded by Chrysler. The directors were notified every ten days concerning the sales picture.

So good was the outlook, that on March 7, 1963, the President of Chrysler made a speech before the New York Society of Security Analysts, in which he stated that the "outlook for the automobile industry as a whole continues to be highly favorable," and "he can see no reason why the industry should not sell another seven million new cars at retail in 1963." On May 16, 1963, the New York Times carried an article which stated that a record year was anticipated for the auto industry in 1963.

Not one word of this information was set forth in the proxy material which solicited the stockholders votes.

The matter was voted at the stockholders meeting of April 16, 1963. Of the 9,063,502 Chrysler shares

entitled to vote, 6,699,016, or 73 percent of the total outstanding shares, voted in favor of the 1963 Plan. Of this 73 percent in favor of the 1963 Plan, 10 percent were under the control of persons who would personally gain by an increase in incentive compensation under the 1963 Plan.* The 63 percent balance was proxy-solicited.

The proxy-solicited votes were the determinative votes. These votes gave Chrysler management the stockholders quorum which was necessary in order to ratify the 1963 Plan.

Business was so good in 1963, that Chrysler earned $325,000,000 before taxes as against $126,000,000 before taxes in 1962. This resulted in an incentive compensation fund for 1963 under the 1963 Plan, which was $1,544,758.12 greater than it would have been under the 1956 Plan.

When the matter came before the Delaware Chancery Court for its approval, if found that, at the time the directors solicited the proxies and called upon the stockholders to vote upon the adoption of the 1963 Plan, the directors had vital knowledge and information which assured them that the 1963 Plan would produce a substantially greater fund for 1963 than would the 1956 Plan. The court held, however, that the only consequence of the failure of the directors to reveal this information in the proxy material, was to require the defendant directors who would have re-

* The 10 percent comprised the shares owned by management; the 660,000 shares owned by Consolidation Coal Company, whose Board Chairman was also Chairman of the Board of Chrysler; and the 350,000 shares which were voted by the trustees of the Chrysler Thrift Stock Ownership Program.

ceived more for 1963 under the 1963 Plan, to give up those additional benefits. In order to achieve this result, the Chancery Court determined that it would approve the settlement only if the defendant-directors agreed not to take more for 1963 under the 1963 Plan, than they would have received under the 1956 Plan. The defendant-directors agreed to do this, and the Chancery Court approved the settlement.

The limited condition imposed by the Chancery Court had the effect of validating the 1963 Plan, even though stockholder approval thereof was obtained in violation of the proxy solicitation requirements of the Securities Exchange Act. It permits the defendant-directors who actively participated in the violation of the Securities Exchange Act, to participate in the additional benefits of the 1963 Plan, for all years after 1963. It permits all other persons to participate in the additional benefits of the 1963 Plan, for all years including 1963. It permits these consequences to obtain, even though the Plan had its genesis in violation of the Securities Exchange Act.

The detrimental consequence of this violation of the Securities Exchange Act to Chrysler and its stockholders, has clearly been demonstrated for the years 1963 and 1964. For the year 1963, the 1963 Plan requires Chrysler to pay $1,411,118.12 more in incentive compensation than Chrysler would have been required to pay if the 1956 Plan continued in effect.* For the year 1964, the 1963 Plan requires Chrysler

* This figure comprises the $1,544,718.12 which the 1963 Plan would require it to pay, less $133,600 which the defendant-directors agreed not to take by accepting the limited condition imposed by the Chancery court.

to pay some $2,000,000 more in incentive compensation than Chrysler would have been required to pay if the 1956 Plan continued in effect.* While the figures are not yet definitely known for the model year 1965, the favorable acceptance of the 1965 Chrysler model and the highly favorable outlook for the automobile industry as a whole, indicates that if the 1963 Plan is held valid, Chrysler will be required to pay for the year 1965, in excess of $2,500,000 more than it would have been required to pay under the 1956 Plan.

Upon appeal to the Supreme Court of the State of Delaware, that court affirmed the determination of the Chancery Court. The Delaware Supreme Court refused to invalidate the 1963 Plan even though the stockholder vote was invalidly solicited in violation of the proxy solicitation provisions of the Securities Exchange Act. The Delaware Supreme Court refused to give the stockholders of Chrysler the protection of the Securities Act. It held that the limited condition imposed by the Chancery court, adequately took care of the violation of the Securities Exchange Act.

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* The net income of Chrysler for 1964 is $213,770,302 as against a net income of $161,595,098 for 1963.

## I

**The determination of the Delaware State Court deprives the Chrysler stockholders of the protection given them by the Securities Act of 1934.**

This court has now made it clear: (a) that private parties have a right under Sec. 27 of the Securities Act to bring suit for violation of Sec. 14a of the Act; and (b) that this right of action exists as to both derivative and direct causes.

> *J.I. Case Company* v. *Borak,* 377 U.S. 426 (1964)

As pointed out by this Court in *J.I. Case,* the private right to bring suit for violation of Sec. 14a, stems from "the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" (377 U.S. 426, 433).

The Congressional purpose behind Sec. 14a, is to secure to every equity security bought on a public exchange, the important right of fair corporate suffrage, and to prevent the recurrence of abuses which will frustrate the free exercise of the voting rights of stockholders. In *J.I. Case,* this Court said at 377 U.S. 426, 431:

> "The purpose of § 14 (a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. The section stemmed from the congressional belief

> that '[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.' H. R. Rep. No. 1383, 73d Cong., 2d Sess., 13. It was intended to 'control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders.' *Id.*, at 14. 'Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.' S. Rep. No. 792, 73d Cong., 2d Sess., 12. These broad remedial purposes are evidenced in the language of the section which makes it 'unlawful for any person . . . to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security . . . registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest *or for the protection of investors.*' (Italics supplied.) While this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result."

In the case at bar, the Delaware Court refused to grant to petitioner Ezzes in his derivative capacity of litigant for all the Chrysler stockholders, the judicial relief which this court has held must be made available to every equity security bought on a public exchange, and which is necessary to carry out the Congressional purpose of insuring fair corporate suffrage

and preventing abuses which frustrate the free exercise of the voting rights of stockholders.

As acknowledged by the Supreme Court of Delaware in its opinion (Appendix, pp. 22-23), the actions of the directors in approving the 1963 Plan at the meetings of Feb. 7, 1963 and March 21, 1963, was illegal for two reasons: (a) there was no valid quorum, because virtually all of the directors who voted were interested in the outcome, and (b) the directors violated Art. II Sec. 9 of the Chrysler By-Laws, which prohibit a director from voting or being present at any matter in which he is interested, when the vote is taken. According to the Delaware Supreme Court, both of these defects could be cured only by valid stockholder action. (*Kerbs* v. *California Eastern Airlines,* 33 Del. Ch. 69, 90 A. 2d 652, 1952). As further acknowledged by the Delaware Supreme Court, only valid stockholder action could give validity to the 1963 Plan because the 1956 Plan, by its terms, could be changed only by valid stockholder action.

It follows then, that since the Delaware Supreme Court upheld the validity of the 1963 Plan, it determined that it could give validity to the voting at the April 16, 1963 stockholders meeting, even though the affirmative votes necessary to give stockholder approval, were proxy-solicited in violation of Sec. 14a.

We submit that the determination of the Delaware Supreme Court was a denial to Petitioner Ezzes of the derivative rights which this Court in *JI Case* held that Sec. 14a gives him.

The purpose of the defendant-directors in voting approval of the settlement, was to get rid of this liti-

gation without personally paying one cent for any release, and with Chrysler and its stockholders footing the bill. The purpose of the directors in approving the change from the 1956 Incentive Plan to the 1963 Incentive Plan, was to make it look like they were proposing a fair deal to the stockholders, when, on the basis of the information which they had to the effect that the 1963 Plan would provide more incentive compensation than would the 1956 Plan, they were really trying to take advantage of the stockholders. They took advantage of the stockholders by soliciting proxies and withholding the vital information which they had. As a result of withholding this information, they succeeded in getting proxies which enabled them to vote for the 1963 Plan which will already cause Chrysler to pay out incentive compensation which is approximately $3,500,000 greater than it would have had to pay for 1963 and 1964, and which will be greater for 1965 and probably the remaining life of the 1963 Plan.

This is just the kind of abuse of corporate suffrage which Sec. 14a seeks to prevent. There was no fair corporate suffrage because vital information was withheld. The withholding of the vital information frustrated the free exercise of the voting rights of the Chrysler stockholders.

We submit that the only judicial relief which could achieve the results envisioned by the purpose of Sec. 14a, is to determine that the votes of the stockholders at the April 16, 1963 meeting were invalid because invalidly obtained in violation of Sec. 14a, and that the 1963 Plan was invalidly adopted.

## II

**Unless the Delaware State Court is required to determine that the proxy votes were invalid, the Chrysler stockholders will be deprived of property without due process.**

The Delaware Supreme Court held that the violation of Sec. 14a was taken care of by the limited condition imposed by the Chancellor, to the effect that no director-defendant shall receive greater benefits under the 1963 Plan for the year 1963, than he would have received under the 1956 Plan. In the light alone, of what the invalid proxy solicitation is costing Chrysler in increased incentive compensation for the year 1963, the limited condition imposed by the Chancellor gives no meaningful relief to the Chrysler stockholders for the invasion of their fair suffrage rights. In the light of the increased incentive compensation which the 1963 Plan would give the defendant-directors for the year 1964, the limited condition imposed by the Chancellor which required the defendant-directors to give up their increased benefits for 1963 only, would certainly not have the effect of preventing future attempts to invade the fair suffrage rights of stockholders for the benefit of management. The defendant-directors will make up in 1964, what they agreed to give up for 1963, and then will be able to reap the further benefits of their invalid proxy solicitation in the years commencing 1965.

We point out in passing, that the judicial remedy granted by the Delaware Supreme Court, was in viola-

tion of well established principles of Federal and State fiduciary law. Apart from Sec. 14a of the Securities Act, it is well established that stockholder action can be held valid only if, as a prerequisite thereto, the directors carry out their fiduciary obligation to give the stockholders full and complete notice concerning all material facts necessary to enable them to make a knowledgeable vote (*Kerbs* v. *California Eastern Airways,* 90 A. 2d 652, Sup. Del. 1952; *Lieferant* v. *Bartel,* 36 Misc. 2d 477, 232 N.Y. Supp. 2d 1303, Sup. N.Y. 1962). In accordance with the principle that neither a fiduciary nor anyone who participates in a breach of fiduciary obligation may benefit therefrom, the Delaware state court should have determined that neither the defendant-directors nor any director who voted for the 1963 Plan, may benefit therefrom at any time during the existence of the Plan (*Magruder* v. *Drury,* 235 U.S. 106, 119 (1914); *Bennett* v. *Propp,* 187 A. 2d 405, Sup. Del. 1962). In accordance with the principle that a third person may not benefit from a breach of fiduciary obligation if he gave no value or had notice of the breach, the court below should have determined that no one may benefit from increased incentive compensation at any time under the 1963 Plan (*Higgins* v. *Shenango Pottery Company,* 279 F. 2d 46, 3rd Cir., 1960; *Cahall* v. *Lofland,* 12 Del. Ch. 299, 114 A. 2d 224, 1921).

It is our view that the failure of the Delaware State Court to apply the above well established principles of fiduciary law, has the effect of depriving the Chrysler stockholders of property without due process. This deprivation of due process, is compounded by the clear denial to the Chrysler stockholders, of the protection given them by Sec. 14a of the Securities Act.

## III

**The Delaware State Court should be required to give the Chrysler stockholders the protection of Sec. 14a.**

There are circumstances where a litigant requiring the protection of a Federal Statute, cannot choose a Federal forum. In such case, he must look to the State court for protection under the Federal Statute.

In many instances, the State law may differ from the Federal law as to the quality and kind of protection which is afforded. If the State court is permitted to disregard the protection afforded by the Federal Statute, the litigant who requires the protection of the Federal statute, will be deprived of property without due process and will be placed upon an unequal footing with a litigant who has the choice of whether to go to a Federal or State forum.

In the case at bar, petitioner Ezzes is acting in his derivative capacity for the benefit of all stockholders. He claims that stockholders' approval of the 1963 Plan, was illegally obtained in violation of Sec. 14a of the Securities Act. Because the issue arose in connection with the settlement of a stockholders' derivative action and in circumstances where the proponents of the settlement participated in the violation, petitioner Ezzes had no alternative but to assert his claim in the State court as a defense to the relief which the proponents of the settlement sought when they requested the State Court to approve the settlement and the 1963 Plan which is part of the settlement.

The State Court of Delaware has refused to give the Chrysler stockholders the protection of the Securities Act, and has held that the 1963 Plan was validly approved by the stockholders even though the proxy solicited vote was vital and that vote was solicited in violation of Sec. 14a. If the determination of the State Court is permitted to stand, it will mean that State Courts in these circumstances can disregard applicable Federal Statutes and grant immunity for violations thereof. In order to make it clear that State courts are forbidden to do this, the within petition for certiorari should be granted.

## IV

**The writ of certiorari should be granted in order to safeguard fair corporate suffrage.**

*JI Case* holds that in a Federal forum, fair corporate suffrage must be protected by the granting of judicial relief which will carry out the purposes of Sec. 14a. The question posed by the within petition for certiorari is whether, in the circumstances of the case at bar, a State court must grant the same judicial relief regardless of whether State law differs from Federal law.

The question is one of nationwide importance. *JI Case* only goes part of the way to protect equity security investors on public exchanges, by assuring them of the protection of Sec. 14a in Federal forums. In order to complete the protection of such equity security investors, this court must make clear that State courts are required to give the same protection.

## Conclusion

It is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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# APPENDIX

## Mandate (Judgment) Supreme Court of Delaware

**(Pursuant to Rule 14)**

THE SUPREME COURT OF THE STATE OF DELAWARE

*To the Honorable the Judges of the Court of Chancery of the State of Delaware in and for New Castle County:*

GREETING:

WHEREAS, before you or some of you in a cause entitled as follows:

Sol A. Dann, et al. v. Chrysler Corporation, et al., No. 1330
Mary L. Gallo, et al. v. Paul C. Ackerman, et al., No. 1585

a certain judgment or order was entered on the March 9, 1964, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on November 18, 1964, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby affirmed, with costs, hereby taxed in the sum of $4,328.60 to be recovered by certain defendants below, appellees in the amount of $3,890.11, and plaintiffs below in No. 1330 except Sol A. Dann in the

amount of $438.49 against the appellee Chrysler Corporation, with right of execution.

WITNESS The Honorable Daniel F. Wolcott, our Associate Justice at Dover, the first day of January, A.D. 1964.

Issued December 7, 1964.

T. E. TOWNSEND, JR.,
Clerk of the Supreme Court.

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**Excerpts from Decision of Supreme Court of Delaware**

The objector Ezzes makes a final point to the effect that approval of the 1963 Incentive Compensation Plan by the directors and stockholders was invalidly obtained.

He points out that of the directors present at the meetings of February 7, 1963 and March 21, 1963, which resulted in the recommendation of the Plan to the stockholders, all but two on February 7, and all but four on March 21, were either recipients of incentive compensation or defendants in these actions or both. Upon this fact, it is argued that the Board's action in approving the settlement, including the amendment to the Plan, was invalid as a violation of Article II, Section 6 of Chrysler's bylaws requiring a majority of directors in office to constitute a quorum, and as a violation of Article II, Section 9 of the bylaws providing that no director shall vote upon a

matter in which he is interested, or be present when the vote is taken.

Ezzes overlooks the fact that the action of the directors did not bind Chrysler to the amendment in the Compensation Plan since, under the then-existing Plan, the sole method of change was by stockholder action. The most the directors could do in this respect was to submit to the stockholders the proposed change. This is what was done. Whether or not, therefore, there was some legal defect in the directors' action, that defect could be cured by informed stockholder action. *Kerbs* v. *California Eastern Airlines,* 33 Del. Ch. 69, 90 A. 2d 652.

Ezzes says, however, that there was no effective stockholder action because a fair disclosure of the facts was not made to the stockholders in that they were not informed of the future profit potentials of Chrysler and the resulting possibility of payment of greatly increased incentive compensation under the amended Plan. He charges that before April 16, 1963, the date of the stockholders' meeting, the directors knew that the new Plan would produce a substantially greater fund for incentive compensation for 1963 than would the old Plan; that there had been general public acceptance of Chrysler's 1963 model; that sales and earnings figures pointed to an outstanding year for Chrysler, and that general conditions known to the automobile industry indicated that the industry would have an outstanding year in 1963. The failure to include this information in the proxy material and the notice of settlement hearing, it is asserted, constituted a breach by the directors of their

duty to make a full and frank disclosure to stockholders.

It appears, however, that these matters were largely disclosed to the stockholders in the Annual Report for 1962 which was sent to them at or prior to the starting of solicitation of proxies. Indeed, it would seem as though a large part of the information Ezzes says was withheld was a matter of general public knowledge.

In any event, we are satisfied that the stockholders were fully informed and acted in the light of that information except, possibly, with respect to the charge that the directors knew that the new Plan would produce substantially greater compensation for 1963 than would the old Plan. The Chancellor, however, imposed as a condition upon his approval of the settlement the requirement that no director-defendant shall receive greater benefits under the Plan in 1963. We think this condition adequately takes care of Ezzes' objection.

## Securities Exchange Act of 1934

### Sec. 14(a), 15 U.S.C. Sec. 78n(a)

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect to any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

### Sec. 27, 15 U.S.C. Sec. 78aa

The district courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district, or in the district wherein the defendant is found or is an inhabitant or

transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

## Rules and Regulations Under Securities Exchange Act of 1934

### Rule 14a-9, 17 CFR § 240.14a-9

*False or misleading statements.* No solicitation subject to §§ 240.14a-1 to 240.14a-10 shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication written or oral containing any statement which at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.